

2. Ownership Limitations for Free Speech Stations.

A Free Speech Licensee could be commercial or noncommercial. Under a "one to a customer" rule, it could hold only one license per market, and could not be owned by a Traditional or Entertainment Station in the same market. It could not be operated in an LMA, although JSAs would be permitted. Diversity-promoting ownership incubators would be encouraged, as would logical efforts to conserve expenses such as sharing transmitter facilities. There would be no national ownership cap for Free Speech Licensees.

3. Programming Requirements for Free Speech Stations.

A Free Speech Licensee would be expected to devote at least half of its non-nighttime airtime to nonentertainment programming: news, public affairs, religious programming or public service. If necessary, the licensee could use the rest of its airtime to subsidize its nonentertainment programming.^{221/}

4. Programming Requirements for Entertainment Stations.

An Entertainment License could broadcast almost anything it chooses, including almost entirely music or advertising. It

^{221/} This approach is similar to that used in Canada for stations it designates as "ethnic" facilities. Under CRTC's regulations, ethnic stations are required to "devote at least half of their schedules to programming in third languages, that is, in languages other than French, English or an Aboriginal language. This will ensure that the Canadian broadcasting system reflects Canada's linguistic diversity." Ethnic Broadcasting Policy, CRTC P.N. 1999-117 (July 16, 1999) at 1. Moreover, an ethnic station may "establish a business model under which 40% of its schedule may be non-ethnic programming order to generate revenues required to support its ethnic programming....it is noteworthy that two ethnic radio stations have [] adopted such a format, using religious programming to subsidize ethnic programming." Id at 3 ¶17.

would have a bedrock obligation to serve community needs, but would have no issues/programs list or specific issue-responsive programming obligations, or other nonengineering obligations apart from EEO, Section 315 and the indecency rules.

5. Removing Market Entry Barriers.

To help remedy the consequences of discrimination, prevent discrimination, promote competition and promote diversity in the most narrowly-tailored way, eligibility to be a Free Speech Licensee would initially be governed by an "early eligibility" procedure, modelled to some extent like the procedure used in Clear Channels. This procedure would give small disadvantaged businesses ("SDBs"), including but not limited to most minority broadcasters, the initial eligibility to become Free Speech Licensees on bifurcated channels. However (unlike in Clear Channels), if no qualified SDB were interested in being a Free Speech Licensee, other entities would then be eligible.

6. Growth Opportunity For Traditional Broadcasters.

For each of its existing channels bifurcated, the Traditional Broadcaster could secure an additional AM or FM channel, which it would also be expected to bifurcate.^{222/} In this

^{222/} Since each Entertainment Station added to a platform would spawn a Free Speech Station with the same engineering attributes, there would be little reason to restrict whether additional stations acquired by the platform owner are AMs or FMs. For example, suppose a platform owner starts with five FMs and three AMs. It bifurcates all three AMs and an FM, then it acquires four more FMs, each of which it is also required to bifurcate. At the end of the day, the platform would consist of twelve stations: four Traditional (168 hour per week) FMs, five Entertainment (148 hour per week) FMs, and three Entertainment (148 hour per week) AMs. These would spawn three AM and five FM Free Speech

(n. 222 continued on p. 121)

way, each Bifurcation Election would expand a platform of Traditional and Entertainment Stations by one, while yielding two new radio stations.^{223/} This "bifurcate, then buy and bifurcate" procedure is essential to producing a net gain in viewpoint diversity, since otherwise a Traditional Broadcaster could take out a fulltime voice through purchase and replace it with a parttime one. Under our concept, in each transaction viewpoint diversity essentially takes one step back and two steps forward.

7. Antitrust Limitations.

The number of Traditional and Entertainment Stations comprising a platform would be governed by Section 202(b)(2)'s "new station" exception to Section 202(b)(1).^{224/} Thus, the ceiling for platform size would be governed by antitrust or public interest

^{222/} (continued from p. 120)

Stations, each independently owned -- representing a huge net increase in viewpoint diversity and other public interest benefits. Restrictions on bifurcating AMs to buy FMs would be needed, however, if our concept were modified to allow a Traditional Broadcaster to bifurcate two of its currently-held (e.g., AM) stations in order to buy (but not be required to bifurcate) an FM station.

^{223/} In theory, as many as six Free Speech Stations could fit on a single channel. Thus, again in theory, a platform owner could be allowed to bifurcate one channel seven ways (six Free Speech Stations and one (midnight to 6 AM) Entertainment Station), then buy six more stations on condition it bifurcate one of them seven ways. This would yield twelve Free Speech Stations (six each on two channels) as well as a platform consisting of twelve Traditional Stations and two night-time only Entertainment Stations. That would deliver considerable viewpoint and source diversity, but by lumping twelve Free Speech stations onto just two channels it could run the risk of marginalizing these stations in the eyes of the public. This scenario might be attractive if each of the two channels being bifurcated were high powered, full service FMs.

^{224/} See discussion at pp. 158-61 infra.

limits on advertising revenues or listenership.^{225/} Nonetheless, we emphasize and cannot say strongly enough, that platform aggregation (Traditional plus Entertainment Stations) must never be allowed to proceed to the point where a platform has so much of the market's advertising revenue and so much of the market's spectrum that no standalone owner can survive and serve audiences capable of supporting a fulltime service.^{226/} As we maintain throughout these Comments, the Commission should strive for a balance between platforms and standalones -- and if it adopts this proposal, a balance among platforms, fulltime standalones, and Free Speech Stations.

If Free Speech Radio were created, the public would be the greatest beneficiary. Many stations today offer perhaps one hour per week of scattered, perfunctory and noncontroversial public service spots. But after a 168-hour per week Traditional Licensee bifurcates a channel, a listener could tune to that channel at a specific time and know that she will enjoy news, public affairs, public service or religious programming totaling at least ten hours per week and probably more. If several platform operators undertook channel bifurcations, the public would experience thought provoking, informational and inspirational programming in a quantity and variety reminiscent of the Golden Age of Radio.

^{225/} See 49-50 supra (preferring bright-line rules over case-by-case review).

^{226/} See Platform Size and Program Formats, supra, at 22.

wireless -- and allowed small firms to prosper through bifurcation of key attributes of a license -- geography and spectrum.^{230/}

To be sure, there has been one very well-intentioned structural initiative that failed because it contained insufficient incentives to bring about any material restructuring of broadcast ownership.^{231/} Thus, the key threshold question is whether the

^{230/} In 1996, the Commission proposed to allow PCS licensees to carve out smaller, more affordable commercial mobile radio licenses through geographic partitioning and spectrum disaggregation. Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees: Implementation of Section 257 of the Communications Act -- Elimination of Market Entry Barriers (Report and Order and Further Notice of Proposed Rulemaking), 11 FCC Rcd 21831 (1996), recon. denied, 15 FCC Rcd 8726 (2000). The Commission's decision -- with Section 257 in its very caption -- concluded that its new rules would "eliminate barriers to entry for small businesses seeking to enter the PCS marketplace and [] promote the rapid creation of a competitive market for the provision of PCS services." Id. at 21882 ¶114. The Commission followed this approach in six subsequent proceedings that also proposed spectrum partitioning and disaggregation. Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service (Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking), 13 FCC Rcd 19064, 19092-93 ¶52 (1998); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band (Second Report and Order), 12 FCC Rcd 19079, 19129-35 ¶¶142-159 (1997); Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands (Report and Order and Second Notice of Proposed Rulemaking), 12 FCC Rcd 18600, 18669 ¶168 (1997); Amendment of the Commission's Rules Concerning Maritime Communications (Second Report and Order and Second Further Notice of Proposed Rulemaking), 12 FCC Rcd 16949, 16995-97 ¶¶91-95 (1997); Amendment of the Commission's Rules Regarding Multiple Address Systems (Notice of Proposed Rulemaking), 12 FCC Rcd 7973 7987 ¶27 (1997), rules adopted in Amendment of the Commission's Rules Regarding Multiple Address Systems (Report and Order), 15 FCC Rcd 11956, 11982 ¶68 (2000); Paging Systems Second Report, 12 FCC Rcd at 2806 ¶168.

^{231/} We refer to the Mickey Leland Rule, which between 1985 and 1992 permitted the owner of twelve AM, FM or TV stations nationwide to hold a minority interest in two more stations in each service if the majority interests were held by racial minorities. Only four companies took advantage of the rule. See discussion at pp. 64-65 supra.

Free Speech Radio concept as we present it here embodies a sufficient incentive for bifurcation.

The mathematics of a bifurcation incentive is fairly straightforward. An economically rational Traditional Broadcaster would be likely to elect bifurcation if the income received from the "sale" of 20 hours per week of airtime, plus the value of the opportunities for platform growth and further program deregulation, together exceed the transaction cost of bifurcating, plus the foregone advertising revenues from the bifurcated 20 hours per week, plus the additional (albeit slight) loss of whatever competitive edge attaches to the ability to hold oneself out to the public as a 168-hour service rather than a 148-hour service. Put rigorously, suppose:

- PS: price paid by Free Speech Broadcaster for the 20-hour station
- VP: added value to platform operator attendant to the ability to have a larger platform as a result of bifurcation
- VR: added value to platform operator attendant to the ability to have Entertainment Station operate with less program regulation
- TC: transaction cost of bifurcating, including promotion charges and legal fees
- NPS: net present value of advertising sales the Traditional Broadcaster would have received for spots in the 20-hour bloc
- FCP: "Fulltime Convenience Premium" -- the premium in station value attendant to being able to hold out to listeners and advertisers that one's station delivers a particular type of programming during every hour of the week.

Thus, bifurcation is attractive to a platform owner if:

$$(PS + VP + VR) > (TC + NPS + FCP).$$

In an active market for broadcast transaction, PS and NPS should almost cancel each other out. The market for radio spectrum remains strong enough to permit sellers to find buyers willing to provide fair compensation for the assets being sold. Furthermore, TC should be manageable if the Commission keeps the rules relatively uncomplicated.

The Fulltime Convenience Premium associated with offering only 148 rather than 168 hours a week of format-specific programming is probably very slight, especially if listeners have clear notice of which 20 hours are devoted to another purpose. Advertising sales rates for a 148-hour operation would probably be little different from the rates a 168-hour operation could command. Listeners desiring only entertainment from their radio listening experience are sophisticated enough to tune out during times when nonentertainment content is offered, as long as such offerings occur in predictable and definable blocks. Radio listeners are clever enough to discern when their music might briefly take a vacation. Radio listeners are the same Americans who listen to television and use the Internet. Almost every television station broadcasts many "formats"; viewers adjust by changing channels several times a night. Cable channels, defined by their dominant formats, sometimes broadcast completely different formats (e.g., infomercials) in certain time slots without suffering a noticeable loss of their core audiences. Internet users change websites several times an hour; indeed, radio listeners themselves change channels during excessive advertising "clutter", but inevitably they return.

Radio listeners are bright enough to figure this out. They will adjust to a channel occupied by a "daytime" station and an "evening station", or to one occupied by a "weekday station and a weekend station." Thus, FCP, while significant, is not so overwhelming a number that incentives cannot be devised that would overcome its influence. Consequently, VR and VP can be designed so that their combined value far exceeds FCP.

As noted above, VR is the value to a licensee of having the ability to broadcast almost anything it chooses, including almost 100% music or advertising. That paradigm would apply to Entertainment Stations. Since each bifurcation of a station in an existing platform creates two Free Speech Stations, there is little reason to also require an Entertainment Station to do much more than entertain. It would have a bedrock obligation to serve community needs, but there is no reason for an Entertainment Station to have an issues/programs list or to have nonengineering obligations apart from EEO, Section 315 and the indecency rules.

To be sure, a licensee might not save much money by being freed of such feeble obligations as the issues-programs list.^{232/} Still, some economic value to the owner of an Entertainment Station may derive from the slightly greater assuredness of license

^{232/} For example, about eight staff hours are required to prepare four quarterly issues/programs lists, for a cost of perhaps \$100 - \$200 per year. The cost of airing the issue-responsive programming is virtually zero, since the underlying regulation allows for non-local PSAs. The PSAs are available for free (or, sometimes, broadcasters can even charge for them) and they can be inserted into the schedule wherever unsold ad avails appear. Obviously, many stations spend much more than a couple hundred dollars a year meeting community needs, but they are not required to spend more.

renewal, inasmuch as there would be few causes of action that could give rise to a legitimate challenge. Nonetheless, this approach is worth considering even if it only helps bring a few Free Speech Stations into being.^{233/}

The far more significant factor that could incentivize bifurcation is VP -- the added value to the platform operator in being able to enlarge its platform.

A threshold policy question is how many stations would have to be bifurcated in exchange for allowing a platform operator to acquire most of the airtime on additional channels in a market. If the company had to bifurcate all of its stations just to get one additional 148-hour facility, it would wind up with fewer total hours per week (nine times 148 is 1,332 hours, while eight times 168 is 1,344 hours). That would actually disincentive bifurcation. However, if the platform operator could obtain a ninth (148-hour) station just by bifurcating that one channel, the public might not gain an additional voice because the addition of the Free Speech Station would be offset by the loss of the voice formerly represented by the ninth station under independent ownership.

^{233/} It could be argued that if an Entertainment Station is not obligated to provide any public service, it should no longer be counted as a voice for the purpose of evaluating diversity of viewpoints. That argument has some force, but the argument to contrary is that the issues/programs list, and a few PSAs per week, do not make a station a voice, any more than going through airplane screening makes one a safe passenger. The issues/programs list is only the means to an end, and not a very good means at that. The potential use of the airwaves -- whether that use materializes without specific federal requirements or with only ephemeral ones -- is what makes a radio station a voice. An Entertainment Station would be a voice because it would still carry a bedrock obligation to serve community needs, and because it would still be subject to Section 315.

Our approach would allow a platform operator to acquire (up to antitrust or public interest competition limits) one additional 148-hour station for each preexisting station it bifurcates. Thus, a company with eight 168-hour stations could operate seven 168-hour stations and two 148-hour stations; or six 168-hour stations and three 148-hour stations, and so forth. At the outside, the company could operate sixteen 148-hour stations if (a big "if") in doing so it would not come to control so much advertising revenue and spectrum that fulltime standalones could not survive and serve audiences capable of supporting a fulltime service.^{234/} Here is what a growing platform would look like, and what its contribution to the number of stations in the market would look like, for a platform owner that elects sequential bifurcations of each of its original eight stations.

TABLE 1
METAMORPHOSIS OF AN EIGHT
STATION PLATFORM UNDER BIFURCATION

Number of Bifurcation Elections	Number of Traditional Stations (168 hrs/wk)	Number of Entertainment Stations (148 hrs/wk)	Platform Size (sum of Trad- itional and Entertainment Stations)	Number of Free Speech Stations (20 hrs/wk)	Number of Stations Using Platform's Channels
0	8	0	8	0	8
1	7	2	9	2	11
2	6	4	10	4	14
3	5	6	11	6	17
4	4	8	12	8	20
5	3	10	13	10	23
6	2	12	14	12	26
7	1	14	15	14	29
8	0	16	16	16	32

^{234/} See p. 122 *supra*.

The numbers in the right-hand column demonstrate how the public benefits as platforms grow under the Free Speech Radio concept. A licensee that metamorphoses from eight 168-hour/week stations to sixteen 148-hour/week stations would create sixteen new Free Speech licensees -- sixteen new, independent voices, each broadcasting at least ten hours per week of issue-responsive programming. That should more than offset the loss of viewpoints aired by the stations by the platform owner. If a broadcaster delivers to the public this huge net gift of free speech, it deserves an opportunity to reach more listeners by acquiring additional entertainment outlets.

This leads to the ultimate question in any analysis of a proposed rule: at the end of the day, would the public be better off? The answer is yes -- unquestionably. Today, a multi-station broadcaster in a 30-station, 10-licensee market might control eight stations that account for 30% of the market's revenues. Suppose that an Entertainment Licensee (subject to antitrust limits) chose to operate with two 168-hour stations, and in exchange for bifurcating six of its original eight stations it were permitted to have the 148-hour bifurcated portion of an additional six channels. Thus, 12 Free Speech Stations would be created. Assume that after bifurcation, the platform owner could sell 10 spots per hour at an average of \$50/spot during the 148 hours it would control, and that the twelve Free Speech Stations with which the platform owner shares channels would each realize \$20/spot during the 20 hours they would each control. Further, assume that the spot rates for a nonbifurcated (168 hour) station are \$55/spot and \$22/spot for the

comparable time periods, with the higher rates reflecting a 10% "Format Convenience Premium" (a much higher percentage than in real life). For this analysis, we assume a conservative scenario: the six stations added to the platform had been three AM-FM duopolies, so that three licensees were lost while twelve new Free Speech licensees were gained. Finally, we generously assume that (1) each 168 hour per week station was devoting two hours per week to nonentertainment programming; (2) a 148 hour per week Entertainment Station would devote only 30 minutes per week to nonentertainment programming, and (3) a Free Speech Station would devote only its minimum-permissible 10 hours per week to nonentertainment programming.

Under these assumptions, here is how this scenario might look.

TABLE 2

POTENTIAL ECONOMIC CONSEQUENCES OF A BIFURCATION SCENARIO

	Pre-Bifurcation (8 stations, ea. <u>168 hours/week</u>)	Post-Bifurcation (14 stations, 2 with 168 hours/ week and 12 with <u>148 hours/week</u>)
Number of commercial channels in market	30	30
Platform's number of 168 hr./week stns.	8	2
Platform's number of 148 hr./week stns.	0	12
Number of Free Speech (20 hr./week) stns.	0	12
Number of other (168 hr./week) Stns.	24	18
Number of stations in market	30	42
Number of voices in market	10	19
Total hours for all stns. on air/week	5,074	5,074
Total hours nonentertainment (all stns.)	60	155
Total ad dollars in market/year	\$118,976,000	\$118,976,000
Platform's hours on air/week	1,344	2,072
Platform's spot revenue/week	\$686,400	\$1,059,600
Platform's spot revenue/year	\$35,692,800	\$55,099,200
Platform's % of market's airtime	26.7%	41.2%
Platform's % of market's ad dollars	30.0%	46.3%
Each Free Speech Stn's hours on air/week	0	20
12 Free Speech Stns' total hours on air/week	0	240
Each Free Speech Stn's spot revenue/week	0	\$4,000
12 Free Speech Stns' total spot revenue/week	0	\$48,000
Each Free Speech Stn's spot revenue/year	0	\$208,000
12 Free Speech Stns' total spot revenue/year	0	\$2,496,000
Each Free Speech Stn's % of market's airtime	0	0.4%
12 Free Speech Stns' % of market's airtime	0	4.7%
Each Free Speech Stn's % of market's ad dollars	0	0.2%
12 Free Speech Stns' % of market's ad dollars	0	2.1%

Several tentative conclusions emerge from this table. This single bifurcation election of one company to change from an eight fulltime station platform into a platform of two fulltime stations and eight 148-hour stations would produce the following:

- The market would be transformed from 30 stations/ten voices to 42 stations/19 voices -- almost doubling viewpoint diversity and almost restoring the market to pre-1992 diversity levels.
- The total amount of nonentertainment programming in the market would nearly triple, from 60 to 155 hours.
- The platform would still not control enough ad dollars to trigger DOJ scrutiny or an FCC red flag.
- The platform would realize a 54.4% gain in annual revenue (nearly \$20 million), easily enough to incentivize the bifurcation.
- Each Free Speech Station would earn more than enough from its own ad sales to realize a profit from the operation of a 20 hour per week facility.

Tension could arise between large platforms and Free Speech Radio if the platforms attempted to dominate radio advertising and thus prevent Free Speech Radio from garnering a sufficient share. Such an effort would fail. Advertisers cannot easily buy around a niche format, nor would a platform find it economically viable to sacrifice a fulltime or nearly fulltime signal to duplicate a Free Speech Station's niche format.^{235/} Consequently, a Free Speech Station -- particularly if it is the only station in its niche -- would garner a steady and secure share of advertising revenue irrespective of what the platform operator could gather up with its mainstream formats and their hybrids. Prudent advertisers would buy a platform and then also buy the Free Speech Stations in order to secure 100% market coverage -- an achievement impossible today because there are so few niche formats being broadcast. In this

^{235/} See Platform Size and Program Formats, supra, p. 21.

way, the presence of Free Speech Radio would allow the radio stations in a community -- for the first time -- to compete head to head with newspaper and television stations in offering advertisers 100% market coverage.

Consequently, the Free Speech Radio concept would provide substantial benefits to the public -- and the concept is economically attractive and sustainable. Large, small, majority and minority owned broadcasters, advertisers, people working in radio, and the listening public would all be better off.

The Free Speech Radio Concept is a moderate and largely deregulatory initiative. By using incentives to business aimed at correcting a capital-diminishing structural anomaly (the Format Imperative), the Free Speech Radio Concept would produce a stronger market that attracts more capital, more competitors and stronger competitors, more diversity and more public service. Those who love radio should endeavor to find common ground on the design and details of such a plan.

-155-

**B. The Public Interest Benefits
Of Channel Bifurcation**

We present here the public interest case for channel bifurcation. At the outset, we note that channel bifurcation can be performed pursuant to Section 202(b)(2) of the Act without the need to change the ownership cap above that reflected in Section 202(b)(1).^{236/} However, last month the D.C. Circuit issued a decision which, if it attains finality, essentially confirms that the Commission may raise the ownership cap on its own without Congressional authorization.^{237/}

Nonetheless, just because the Commission may be permitted to raise the ownership cap does not mean that it should do so. If the Commission simply raised the ownership cap, few licensees would go to the trouble of bifurcation. The public might receive the benefits of greater economic efficiency (offset somewhat by the consequences of a reduction in broadcast employment) as well as more hybrid format variety in mainstream formats. But the public would lose the opportunity, otherwise available through a strategy of bifurcation, to receive more competition, viewpoint diversity, source diversity and minority ownership. Those and other benefits of channel bifurcation are detailed below.

^{236/} See pp. 158-161 infra.

^{237/} See Fox Television, *supra*, 2002 U.S. App. LEXIS 2575 at p. 33 (suggesting that Section 202(h), which requires the Commission to "repeal or modify any regulation it determines to be no longer in the public interest," would have no meaning if the Commission could not adjust ownership limitations on its own.)

1. Channel Bifurcation Would Expand
Viewpoint And Source Diversity

a. Scores Of New Voices Of All
Types Would Have Ownership-
Level Access To The Airwaves

The most dramatic advantage of Free Speech Radio is its potential to expand the range of viewpoints available to the public and the range of sources transmitting these viewpoints. This objective is highly favored under First Amendment principles.^{238/} As the Supreme Court has said, "speech concerning public affairs is more than self-expression; it is the essence of self-government."^{239/}

In many contexts, the Commission desires broadcasters to speak rather than entertain. Its Children's Television regulations, Section 315, its pre-Deregulation of Radio programming regulations and (notwithstanding its feebleness) the issues/programs list are constitutionally noncontroversial examples of FCC expectations that a broadcaster's speech contain thoughts. In some contexts (e.g., its nonorigination requirement for translators), the Commission even acts in a content-neutral manner to discourage speech. As long as the Commission does not regulate what is said, it may act to ensure that something is said.

The availability of bifurcation would actually reduce the already modest range of indirect FCC regulation of speech. Presently, every broadcaster must air some nonentertainment programming as a condition of having the privilege of holding a

^{238/} See Associated Press, supra, 326 U.S. at 20.

^{239/} Garrison v. Louisiana, supra, 379 U.S. 64, 74-75 (1964).

license. Those wishing to be broadcasters have no other options. But if bifurcation were permitted, anyone who is or aspires to be a broadcaster would have three options:

- (a) be a Traditional Broadcaster and accept some bedrock obligation to provide nonentertainment programming; or
- (b) be a Free Speech Licensee and accept the responsibility of using the majority of one's airtime to provide nonentertainment programming; or
- (c) be an Entertainment Licensee and broadcast some, or almost no nonentertainment programming.

Thus, the Free Speech Radio concept would provide more First Amendment flexibility for individual broadcasters. At the same time, the bifurcation option would result in substantially greater viewpoint and source diversity for the public. As noted earlier, if in a typical medium sized market one company bifurcated six of its eight stations and then exercised its right to buy and bifurcate six more, the number of voices in the market would almost double and the amount of nonentertainment programming available to listeners would probably almost triple.^{240/} These would be profoundly significant public interest gains.

In addition to providing the public with more listening choices, Free Speech Licensees would promote viewpoint diversity by offering those engaged in radio content creation more workplaces at which to practice and hone their craft. Furthermore, those working in Free Speech Radio would learn how to produce commercially attractive nonentertainment programming. Many Free Speech Radio professionals would take this knowledge to Traditional Stations and

^{240/} See pp. 132-34 and Table 2 supra.

Entertainment Stations, where they would enhance the likelihood that Traditional Stations and Entertainment Stations would also produce commercially successful nonentertainment programming.

b. Radio News, Public Affairs, Public Service, Political and Inspirational Programming Could Recover Their Strength

When it has considered expanding the number of broadcast stations, the Commission has recognized that one of its "basic objective[s]" is to provide "outlets for local expression addressing each community's needs and interests.")^{241/} During the Golden Age of Radio, before format narrowcasting and before television, broadcasters had strong economic incentives to maximize public service. Although those incentives are largely gone, the public today is far better educated than it was two generations ago, and thus the public is better prepared to understand and appreciate the discussion of issues over the air. The success of television news magazines and of television news channels demonstrates the public's hunger for information. Thought provoking, informative and inspirational programming on radio have

^{241/} See, e.g., Modification of FM Rules (Docket 80-90), 94 FCC2d at 158. See also Television Channel Allotments (VHF Drop-ins) (NPRM), FCC 80-545, 45 FR 72902 (November 3, 1980) at ¶¶9, 12 ("any potential loss experienced [by incumbents] will be more than offset by the benefits of such a policy -- additional television service for the public...it is in the public interest to have a regulatory framework that permits the maximum number of signals that can be economically viable" (fn. omitted). See also Low Power Television (R&O), 51 RR2d 476, 525 (1982) (Separate Statement of Chairman Fowler and Commissioner Dawson) ("[l]ow power television may not have the transmission capabilities of full broadcast television, but its capacity to provide televised programming that is directly responsive to the interests of smaller audience segments makes it truly unique in its ability to expand consumer choices in video programming. From this perspective, the power of these stations may be low, but their potential is enormous.")

been diminished by a market anomaly (the Format Imperative), not by low public demand or by any venality on the part of broadcasters. Structural incentives for bifurcation could do much to restore respect for radio's power to inform, illuminate and inspire as well as entertain.

**c. Unprecedented New Opportunities
For Religious Broadcasting
Would Become Available**

The Commission would be on shaky constitutional ground if it either preferred or disincentivized religious programming. Before Deregulation of Radio, the Commission struck a fair balance by including religious programming in its definition of nonentertainment programming, which also included news, public affairs and public service. That category was also broad enough to include content produced by nonbelievers; thus, it did not stray from the Establishment or Free Exercise clauses.^{242/}

Religious broadcasters must to meet the spiritual needs of a far wider cross-section of faiths, denominations, religious traditions and language groups than ever before. The religious community and its language, cultural and theological diversity are growing, but the broadcast spectrum is virtually exhausted. Although about 40% of LPFM applicants are religious broadcasters,

^{242/} See Deregulation of Radio, *supra*, 84 FCC2d at 973 ¶13

(reconfirming that religious programming "can be counted towards meeting the non-entertainment programming guideline.") Our references in these Comments to "religious broadcasting" are slightly awkward shorthand: we mean to include content that expresses the views of humanists, atheists, agnostics and freethinkers, *i.e.*, those who sincerely do not believe that religious faith necessarily defines our place in the universe.

LPFM cannot possibly accommodate even a fraction of the unsatisfied demand for outlets for religious broadcasting.

The cost of purchasing and operating a full power station in a major market is prohibitive for churches; indeed, as we have documented, religious broadcasters tend not own stations in the largest markets.^{243/} Furthermore, platforms tend not to place stations in religious formats.^{244/}

When they attempt to buy time on other stations, churches often experience difficulty. Frequently, a religious group prefers with good reason not to buy Sunday morning time from the handful of stations that time-broker; often, the group is dissatisfied by the aural environment -- frequently a long block of seriatim half-hours of varied programs of inconsistent technical quality, which are necessarily always subject to cancellation by the licensee. While a few religious broadcasters have become quite successful, they seldom would (nor should they be expected to) devote airtime to denominations with which they have religious disagreements.

The availability of several new stations with just enough airtime to meet the needs of a single denomination (or a group of like-minded denominations) would expand the range of religious expression throughout the country by easing the capital requirements that impede the ability of those who wish to speak spiritually to take to the airwaves. The opportunity to be a Free Speech Licensee would open the airwaves to a wide variety of

^{243/} See Platform Size and Program Formats, supra, p. 11 and Chart 4.

^{244/} Id., pp. 18-19.

religious traditions for the first time. Moreover, the programming requirements for Free Speech Radio would impose no burden on religion at all, since, as noted above, religion has correctly been classified as nonentertainment programming since before Deregulation of Radio.

**d. Noncommercial Speech Would
Find Much-Needed New Outlets**

A Free Speech Station would be reasonably priced compared to the cost of a fulltime station. With station prices going through the roof, and new full power facilities available (if at all) only through auctions, Free Speech Stations would be a route to station licensure available to a wide variety of everyday citizens who speak through nonprofit organizations.

Like religious broadcasters, most nonprofits lack the resources to purchase a fulltime station. Moreover, the needs addressed by most nonprofits are specialized, necessitating niche formats that might not generate sufficient advertising to support a fulltime station. The noncommercial reserved band is full in most major cities, and noncommercial licensees are often prohibited by the terms of their governing charters from being time brokers. Bifurcation would offer a partial solution to these difficulties by permitting nonprofits to provide specialized services to audiences with intense demand.^{245/}

^{245/} We have proposed that Free Speech Station ownership should be limited to one to a customer per market. See pp. 166-67 supra. A good case can be made for an exception to this requirement for incumbent noncommercial licensees with grandfathered Class D facilities, since the coverage areas of these facilities are inadequate for full market dissemination of their viewpoints. The same good case for an exception can be made for LPFM operators.

e. **Language Minorities Would
Have Access To The Airwaves**

Share-times came into widespread use two generations ago as a means of serving populations for whom Polish, Italian, Russian and Yiddish (and later Spanish) were the primary and often the only languages used in the home. Typically, in major cities these language groups did not have sufficient size to support a fulltime station, but the language group had sufficient size and intensity of demand to support a parttime station. Time brokerage has largely replaced share times, but in many markets no stations are willing to adopt a time brokered format, or there is no time available on the few stations with this format. Furthermore, since the licensee has ultimate program control, an arbitrary decision by a station owner can entirely cut off all radio programming in the primary language of a large segment of the community.

Today, new language minorities are developing in major cities, in numbers that are more than sufficient to support a radio station. But the spectrum is crowded now, and Asian Americans, in particular, still face discriminatory entry barriers precluding their full participation in broadcasting.^{246/}

^{246/} See Platform Size and Program Formats, *supra*, at 19-20

(calling attention to the "virtual absence of format adoption or even nonformat programming in Asian languages -- particularly Chinese and Vietnamese -- notwithstanding the huge populations for which these are the primary languages," which "contrasts starkly with the representation of programming serving other language groups with the same or smaller numbers of primary speakers....for example, over 750,000 primary Chinese speakers were offered format or nonformat special programming by no more than eleven stations from 1991-2001, while about 1/3 as many primary Polish speakers were offered format or nonformat special programming by at least 145 stations -- thirteen times as much service, a disparity that is probably even greater today.")

As a result, many members of these communities lack interconnectedness with the broader society.

Bifurcation could be a partial solution to this problem. It has the advantage of having already been tried successfully, two generations ago. Given the high cost of airtime and the high demand intensity of those desiring programming in specific languages, a 20-hour per week Free Speech Station, broadcasting in a language unduplicated elsewhere on the dial could do quite well. Indeed, such a station might choose to split its own time into brokered or non-brokered ten hour blocs and thus satisfy intense demand for service in two languages.

**2. Channel Bifurcation Would Maximize
Format Diversity By Increasing Platform
Size And Increasing The Number of
Niche-Friendly Independent Outlets**

As we have found, platform owners expand diversity among mainstream formats by offering hybrids of certain commercially established program types (e.g., classic rock).^{247/} By itself, hybrid formats offer only a modest case for raising the ownership limits. Yet there is another public interest benefit that sometimes may accompany an increase in platform size: the possibility that the platform is large enough to include niche formats. As a platform increases in size, it might surpass the Niche Tipping Point at which it becomes more lucrative to offer a niche format than a hybrid format on an additional station added to

^{247/} See Platform Size and Program Formats, *supra*, p. 21

(concluding that "[t]he adoption of rock hybrid formats by large platforms probably has contributed to the proliferation and variety of rock music programming on the radio.")

the platform. Nonetheless, the Niche Tipping Point is generally greater than eight stations, although it is clearly much lower than 100 stations.^{248/}

In large markets with very diverse populations, a substantial community may have especially high demand for programming in its favored format or language. In such a market, the Niche Tipping Point may be only slightly more than eight stations. Economists should be able to predict the Niche Tipping Point in particular markets.

Suppose the Niche Tipping Point in a particular market is eleven, and suppose further that through bifurcation, a platform of eight Traditional Stations is transformed into a platform that has three Traditional Stations and ten Entertainment Stations. In this example, the platform might likely offer four mainstream formats (stations 1-4), six hybrids (stations 5-10), and three niche formats (stations 11 through 13). Additional niches, too small to support a fulltime service, would likely be served by many of the ten Free Speech Stations created as a result of the bifurcations that gave rise to this platform. This outcome could be desirable in a major market where a large platform would not present anticompetitive concerns and threaten the healthy balance among platforms and standalone stations. After several bifurcations, the market would provide optimal service to the audience through a good balance of eight business models:

^{248/} See pp. 40-41 *supra*.

1. Traditional Stations in platforms, with mainstream formats
2. Traditional Stations in platforms, with hybrid formats
3. Traditional Stations not in platforms, with mainstream formats
4. Traditional Stations not in platforms, with hybrid formats
5. Traditional Stations not in platforms, with niche formats
6. Free Speech Stations, half of whose programming is nonentertainment, mostly provided through niche formats
7. Entertainment Stations in platforms, mostly with with hybrid formats
8. Entertainment Stations in platforms whose size exceeds the Niche Tipping Point, with niche formats.

Only the first five of these business models are implemented in today's radio environment. Bifurcation always would make the sixth and seventh business models possible. Each of these business models would add substantially to the diversity of programming available to the audience. The eighth of these models -- Entertainment Stations with niche formats -- is also possible under bifurcation if the platform size exceeds the Niche Tipping Point. This business model might deserve a chance in a major market where the Niche Tipping Point is greater than eight stations but less than the platform size that would trigger antitrust concerns.

3. Channel Bifurcation Would Strengthen The Radio Industry And Its Competitiveness

Economic efficiency and growth result when any production input can be manipulated to result in an increase in the number of lines of service, e.g., through partitioning and disaggregation. As noted earlier, this principle has driven the Commission's